



### **Poverty, Good Governance and Achieving the Constitution's Promise Heinz Klug Good Governance Conference, Pretoria, October 21-22, 2013.**

As we look forward to twenty years of democracy next year, we can also look back at the extraordinary transformation that has occurred since South Africa's first democratic elections in 1994. The changes that have marked the last twenty years have been both beyond the world's expectations – in the maintenance of peace and democracy – and have fallen short of our hopes, enshrined in a constitutional vision and political promises that have proven very difficult to achieve. My goal today is to talk about the place of our constitution and our commitment to constitutional democracy in our efforts to address the twin scourges of poverty and gross inequality that continue to haunt our country. While some might claim that our failures are the consequence of political ideology and administrative malfeasance, I will explore a more complex set of drivers that link institution building, capacity and the logic of legal continuity, as well as political contestation, to the difficulties of governance.

It is in this context that I have been asked to address the relationship between poverty, good governance and the role of the constitution. While some might question why we are assuming a relationship between good governance and the goal of overcoming poverty, I believe that our history makes this link unquestionable. Some have argued that economic development and the eradication of poverty may be achieved by centralized decision-making, or even authoritarian control, as may have occurred in South Korea, Taiwan or Chile. These arguments I would suggest are a historical and do not adequately address either the particular histories of those cases nor do they acknowledge the fact that in South Africa an authoritarian system did in fact achieve a high degree of economic development but only for the benefit of a small racial oligarchy and at the cost of exclusion and impoverishment for the majority of South Africans.

While enormous institutional, political and social changes have marked South Africa's constitutional revolution, it is important to recognize that the process of legal change that was followed at each step of the transition, included a commitment to legal continuity that has had a significant impact on the ways in which policy, law and processes of governance operate in practice. A striking example of the impact of legal continuity has been the practice and debate over the policy of willing buyer/willing seller in the context of the constitutionally-mandated processes of land restitution and reform. Despite intense debates and the inclusion of explicit language in the constitution-making process to ensure that traditional measures of market value not dominate the constitutional standard of just and equitable compensation in the case of expropriation, the practice of government and the courts since 1994 has meant that market value, and more, has served as the legal and practical benchmark in negotiations over restitution and in the single example of land expropriation that has occurred. While this may

have seemed to be the politically prudent and less conflictual way to resolve difficult negotiations over land restitution in the economically flush years of the mid-1990s, continued reliance on this measure of compensation embedded in the 1975 Expropriation Act has undermined the legitimacy of the restitution and land reform processes. When Parliament attempted to pass a new expropriation bill in 2008, which would have institutionalized the 1996 Constitutional provisions, the response by opponents to the bill was to claim that the proposals undermined the very basis of the negotiated settlement that ended apartheid. As a result the bill was withdrawn and has been introduced this year in a less ambitious attempt to ensure that the constitutional provisions take precedence over the existing statutory law which remains rooted in the apartheid era. Significantly, instead of identifying this formula (willing buyer/willing seller) as an element of both government policy and the legacy of laws inherited from the pre-constitutional era, that are subject to legislative amendment, the response, even among senior government officials, was to begin to question whether the Constitution provides a viable platform for the kind of transformation that a sustainable future requires.

While there is widespread agreement that South Africa's Constitution is a progressive blueprint for addressing the legacies of apartheid, and that the country, the government and the ANC are justly proud of this achievement, there seems at times to be less clarity about how this promise is to be achieved. On the one hand it may be argued that the Constitution represents a vision of what might be – not unlike the 2030 National Development Plan, but on the other hand, the Constitution is the Supreme Law of the land, and by its own terms it declares that all “law or conduct inconsistent with it is invalid.” The same section in the Founding Provisions of Chapter 1 also states that “the obligations imposed by it must be fulfilled.” It is to this distinction, between the Constitution as a guarantee of minimum standards of governance and rights, and as the blueprint of a future that imposes obligations on our institutions of governance, that we must look, to understand both the frustrations of those who feel the Constitution stands in the way of transformation and that the country is failing to achieve the promise of the post-apartheid rainbow. Law provides the basic mechanism through which government implements its policies, through which markets are created, and regulated, as well as a basis for claims against those who abuse power or fail to meet their legally defined obligations. In many cases this means that it is those with access to resources – the haves – who generally come out ahead, since they are able to most effectively mobilize legal resources, yet the legacy in South Africa of public mobilization, non-government organizations as well as progressive lawyering has meant that in fact the Constitution has been repeatedly invoked to protect not only the well-to-do but also the more marginal sections of our post-apartheid society, and to this extent it has gained a reputation around the world as an example of how constitutions might serve as instruments of transformation.

When it comes to the statute book and regulatory framework, the post-1994 era has seen a raft of progressive policies and legislation from the very first statute on the Restitution of Land Rights to legal reform across a wide scope of law effecting both government and private interests. While there is legitimate debate over the policies and laws that have been adopted since the end of apartheid, the greatest area of concern, and an important focus of this conference, is on the problem of effective governance – how are these progressive policies and the rhetoric of development and delivery being translated into reality. Governance from this perspective focuses on the institutions that are needed – from government agencies to the courts, from legal frameworks (including legislation and related regulations) to the elements of a functional market place. Within this context the question of institutionalization becomes central to the question of good governance, since it lies at the heart of the matter. It is only through effective institutions that governance is possible. It is when institutions are undermined, lack capacity or are unable to function effectively that frustration leads to irregular methods, to

shortcuts and ultimately to a level of maladministration and corruption that will undermine the sustainability of these institutions. At the same time, a persistent pattern of legal challenges, in which political conflict is conducted through legal claims, draws all institutions into what has been described by some as “lawfare” the pursuit of political goals through the abuse of legal processes, effectively paralyzing and frustrating regular processes of governance.

While most constitutions today provide an institutional framework for the exercise of power within the nation state, it is a fairly unique feature of the South African Constitution that it provides for a range of interacting institutions, beyond the traditional three-way division of executive, legislature and judiciary, as a means to secure good governance. The revolutionary nature of our Constitution lies thus not only in the expansive framework of rights it guarantees, or the unique system of co-operative government to manage the relationship between regional, local and national levels of government, but also in the constitutionalizing of a set of independent institutions whose role it is to uphold the progressive vision of the Constitution in the face of the ordinary pressures of political horse-trading and interest group politics. While it is these pressures that often tend to dominate the daily life of democracies, in which the voices heard are most often those who have the resources to command media, legal and other forms of attention, the design of the 1996 Constitution and its specific institutional framework is meant to provide a form of governance more responsive to the needs of those who have been historically excluded.

### **Constitutional commitments and the creation of independent institutions**

From early on in the negotiations towards a democratic transition the idea of creating an “ombudsman” to provide an avenue for complaints and investigation of malfeasance and maladministration in the state and its bureaucracy, and even to protect fundamental rights, was shared by the parties. Furthermore, the idea of creating independent governance institutions as means of addressing the high levels of distrust between the parties and to enable specific aspects of the transition – such as the conducting of a free and fair election, was also being discussed. The ANC Constitutional Committee’s working document on “A bill of rights for a new South Africa,” published in 1990 specifically included the establishment of an independent ombudsman as part of the section on the enforcement of rights and “[w]ith a view to ensuring that all functions and duties under the Constitution are carried out in a fair way with due respect for the rights and sentiments of those affected.” The adoption of the Independent Electoral Commission Act, to ensure our first democratic election, provided the first experience in South Africa of an independent institution designed to ensure democratic governance.

The embrace of constitutional democracy became a hallmark of our new constitutional order, whose founding principles describe the Republic of South Africa as ‘one, sovereign, democratic state founded’ on a particular set of values. Apart from the principles that define the values of the Constitution, the Constitution includes structural and institutional elements designed to fulfill the goals of good governance contained in the substance of these principles. A key structural feature of the Constitution is the way in which power is both distributed and integrated in a system of governance that is designed to both avoid the paralysis of a rigid separation of powers but is also meant to ensure that there are multiple avenues for democratic and legal contestation. This combination of distributed and integrated power extends from our system of cooperative government to the allocation of constitutional authority between distinct institutions whose task is to ensure that essential elements of good governance – clean elections, fiscal integrity, transparent procurement and just administration – are maintained as all levels of government grapple with the enormous task of addressing the crippling legacies of colonialism and apartheid. In fact the Constitutional Assembly understood the role of these institutional

features of the Constitution as key to our commitment to constitutional democracy, bringing them together in an innovative and unique fashion in Chapter 9 as State Institutions Supporting Constitutional Democracy. This is not to say that the Constitution is perfect or that these institutions have always played an effective role in our young democracy, but it is important to recognize that they do have a distinct role in ensuring that the promise of human rights and that good governance reaches down into the daily administration of the country and are not merely the subject of five yearly electoral contests or high profile legal disputes.

While there has been increasing debate over the idea of the separation of powers, it is important to recognize that our Constitution's distribution of powers is not based on a rigid separation of powers but is rather premised on a system of checks and balances within a constitutional democracy. Unlike the US system, in which separation of powers is premised both on the allocation of specific powers – such as the power of the purse and executive authority – to institutions that rely on separate electoral mandates and powers, the Congress, Senate and the President, the South African constitution provides for greater integration and interaction between the legislative and executive branches. The checks and balances of the South African constitutional system rely more explicitly on the specific allocation of final constitutional interpretation to the Constitutional Court as well as the creation of distinct institutions whose sole purpose is to provide an independent source of oversight and authority over the state. Even then, these institutions, such as the Public Protector and the other Chapter Nine institutions, are required to report to Parliament who appoints them and has the power to demand an accounting of their role in fulfilling their constitutional mandates. While Parliament may not reduce their independence – which limits the legislatures oversight in regard to the specific matters or activities undertaken by each of these institutions – Parliament may require a public accounting of their overall activities, and if Parliament finds, after the required process, and by a two-thirds majority, that either the Public Protector or the Auditor-General have engaged in misconduct, are incapable or incompetent, then the President may suspend them from office and is required to remove them from office once Parliament has voted for their removal. Thus, despite traditional notions that the separation of powers is located in the distinct functions performed by the legislature, executive and judiciary, the conception of the separation of powers in the South African Constitution incorporates a more sophisticated understanding of the ways in which all branches of the administrative state that emerged in the twentieth century, engage in all three functions – legislative, executive and judicial. Management of power in this context is more effectively achieved both through the interaction of these institutions and the creation of specialized bodies: including constitutional courts, electoral and human rights commissions, as

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Just as the Constitution holds a twin promise, on the one hand, empowering government and protecting existing rights, while on the other hand providing a vision of a nonracial, nonsexist future in which all communities and members of our society may flourish, Chapter 9 establishes institutions that are designed to both secure existing rights and democratic achievements as well as provide an institutional mechanism for establishing the norms and capacities for moving towards the constitution's vision of a brighter future. At one end of the institutional spectrum the Electoral Commission, the Auditor-General and the Public Protector are institutions that are primarily designed to ensure good governance today, while on the other end the Human Rights Commission, and the Commissions for Gender Equality and the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities look both to the present, yet are also designed to advance and extend these interests, towards the achievement of the vision of a more equitable and sustainable society. In order to achieve these goals the Constitution establishes all these institutions as "independent, and subject only to the Constitution and the law," requiring them to be "impartial" and to "exercise their powers and perform their functions without fear, favour or prejudice." The translation of this promise into the reality of functioning institutions has however not been without difficulty.

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From internal personnel conflicts to external challenges to their functioning, legitimacy and financial independence, these institutions have not avoided controversy. Apart from the Electoral Commission -- which has now successfully managed four electoral cycles in addition

to local government elections -- and the Auditor-General which, as a pre-existing institution, had an institutional culture and staff in place, the remaining Chapter 9 institutions have struggled to define and establish their institutional capacities and constitutional roles. At the same time, issues of adequate financing and accountability, as well as the political careerism and resulting caution of some of the office holders in these institutions led to debates over the degree of independence these institutions really enjoy or exercise. After the first ten years the government decided to initiate a review of these institutions, however it soon realized that it would not be appropriate for the executive to conduct such a review. Instead, the executive called upon the National Assembly, to which the Constitution makes these institutions accountable, to conduct a review, and in September 2006 the National Assembly adopted a resolution appointing an ad hoc multi-party committee to review the Chapter 9 institutions and the Public Service Commission.

The report of this committee, chaired by ANC stalwart and Member of Parliament, Kadar Asmal was issued in mid-2007 and called for significant reforms to some of these institutions. Despite the Report and concerns that the Chapter 9 institutions continued to suffer internal tensions and overlapping mandates, there was no immediate effort to make reforms and two years later Kader Asmal, deeply distressed by the failure of the government and National Assembly in particular, to take up the Report in a timely fashion, publicly “accused Parliament of having no interest in his review of Chapter 9 institutions charged by the Constitution with protecting democracy, saying that the failure to debate the review was ‘an appalling scandal’” Despite Kader Asmal’s disappointment, now, nearly a half-decade later, the Chapter 9 institutions have become an unquestioned part of our institutional landscape and despite the unique constitutional character of this ‘fourth’ branch of government, it has proven to be a valuable addition in what has become, from a global perspective, a vibrant and contentious young democracy.

### **The limits of good governance – legal technologies, sophisticated systems and the capacity to govern**

South Africa’s first democratic government came into being at a moment when the technologies of governance and expectations about how government may more readily reflect the imagined efficiency of the market become dominant themes around the globe. The new South African government embraced the latest technologies of governance, from the internet to the recognition of an extensive range of procedural obligations and rights in the administrative and procurement processes of the state. As a result the South African legal framework establishing the rules and processes of good governance is among one of the most sophisticated in the world. From the unique structure of the Constitution to the adoption of a plethora of new statutes, including: The Public Finance and Management Act 1 of 1999; the Promotion of Administrative Justice Act 3 of 2000; the Promotion of Access to information Act 2 of 2000; and the Preferential Procurement Policy Framework Act 5 of 2000. The difficulty however is to ensure that this elaborate legal framework functions.

While the Constitution may attempt to distribute executive authority among a variety of institutions so as to mediate the effects of concentrated power, the emergence of a unipolar democracy has also placed limits on the relative independence of these institutions. Furthermore, the sophistication of our systems of governance requires a high degree of legal capacity, yet the legal field in South Africa, from the profession to academia has also been faced with the necessity and obvious strains of transformation. In the case of legal doctrine, in the field of administrative law itself, there is still a degree of ambiguity and lack of clarity among legal academics and lawyers when it comes to understanding the relationship between the

concepts and principles of administrative law that were part of the common law, and articulated by the courts prior to the new constitutional era, and the adoption of the Promotion of Administrative Justice Act in 2000. Given our history, in which administrative law was creatively used by some progressive lawyers to oppose the arbitrary use of power by the old regime, and the common law lawyer's pride in the sources of administrative law principles, it is not a surprise that many continue to see these principles as in some way underlying or informing the new constitutional and statutory framework. Despite the fact that the Constitutional Court has clearly indicated that the practice of governance is based solely on the new framework, our understanding of the new framework remains deeply influenced by both common law conceptions of administrative law as well as a conception of the separation of powers that is at odds with the more fluid distribution of power that characterizes the structure and institutional provisions of the Constitution.

These impediments and limitations on the transformation of law do not however fully explain the tensions within our governance system which has come under increasing stress as issues of governance become embroiled in the political struggles being waged between different political factions and at every level of government. There are also myriad examples of cases in which government officials, high and low, are accused of corruption, or other wrong doing. In response to these accusations the assertion of legal and administrative process allows different factions to gain access to positions of power and authority while those accused are 'suspended' from their government positions. Add to this the fact that the government has in many cases felt legally obliged to cover the legal costs of those accused of wrongdoing in their official capacities and the result is a new process of political struggle through law within the executive branches of the post-apartheid state.

The formal legal framework within which these conflicts have played out is both clearly stated yet also ambiguously suspended between legal duties and ethical standards. While the President is duty bound to 'uphold, defend and respect' the Constitution, and Members of Cabinet are also formally responsible, 'collectively and individually to Parliament,' the task of achieving executive accountability remains a constant source of tension within the political and legal sphere. In addition to these general constitutional forms of accountability, Cabinet members are also required to abide by a code of ethics that the President published on 28 July 2000 as stipulated by section 2 of the Executive Members Ethics Act adopted by Parliament in 1998. The Constitution specifies, and the Executive Ethics Code reemphasizes, that: members of Cabinet must individually refrain from undertaking other paid work; use their positions to enrich themselves or others; or, act in ways that are inconsistent with their office or involve themselves in situations which might give rise to conflict of interests between their 'official responsibilities and private interests.' The Ethics Code furthermore requires Cabinet members [national or provincial] to declare any "personal or private financial interest" they might have in matters that are before the executive body, and in the case of a conflict of interests either withdraw from the decision-making process or ask the relevant Premier or President for permission to participate. In addition, there is a duty to report these interests.

### **Placing the Public Protector at the institutional center of good governance**

We can thus see that in contrast to the idealism of our legal and constitutional framework the work of ensuring accountability is much more complicated. In practice then, the repeated framing of the law as a neutral arbiter of power must be understood in the context of the politics and institutions that are established and in the practice of the law. In order to understand the place of specific institutions in this process we must recognize that institutions do not exist because they are named in the Constitution, but rather that institutions have histories,

processes and individual participants that together shape their capacity to fulfill the roles assigned to them. If we take the Public Protector as a key example of one of the constitutional institutions for achieving good governance we will be able to reflect on the process of establishing the necessary institutional capacity as well as the resources, time and leadership that is necessary to achieve our goal of good governance.

While the Public Protector was first established by the 'interim' 1993 Constitution and brought into existence through legislation – in the Public Protector Act 23 of 1994 – the institution was given increased status by its inclusion as one of the independent “State Institutions Supporting Democracy” that marked one of the unique features of the final 1996 Constitution. Once provided for by statute it fell to the first Public Protector, Advocate Selby Baqwa to begin the task of setting up the institution at its inception in 1995. If today the Public Protector has offices in all nine Provinces as well as a National Office in Pretoria, it took nearly ten years to create this institutional infrastructure. By 1999 there were only two regional offices, in the North West Province and in the Eastern Cape and it would only be in 2001 that additional offices were added in KwaZulu-Natal, Mpumalanga and the Western Cape. Two additional provincial offices, in the Northern Cape and Free State were added in 2002 while Limpopo and Gauteng were only established in 2003 and 2004 respectively. This process of institution building is reflected too in the budget which grew steadily over a decade from R15,3 million in 1999 to just over R2.1 billion in 2009. Significantly these figures included contributions from non-government sources in the form of grants to help the institution develop.

Another way of viewing this developing institution is to consider its role through the number of cases that it took up and resolved over a decade. If we take the decade from 1999 until 2009 when the present Public Protector took office, we can see a pattern in which cases rose from 9,085 in 1999 to a high of 22,323 in 2005 before falling back to 12,674 in 2008/09. On the one hand, the steady increase in cases until 2005 probably reflects the growing infrastructure and capacity of the Public Protector as it opened offices around the country. On the other hand, the reason for the decline in cases from 2006 until 2009 is less obvious, although it might reflect the negative media attention that Public Protector Lawrence Mushwana received and the perception that while the resolution of cases rose dramatically after his appointment in 2002, there was a feeling that the Public Protector was not pursuing its mandate effectively. This view is strengthened by noting that new cases dropped to an all time low of 5795 in 2009/10 but picked up again to 16,251 in 2010/11 after the appointment of the new Public Protector. While the jurisdiction of the Public Protector has continued to grow, as additional legislation has been passed by Parliament to address issues of corruption and maladministration, Parliament has also repeatedly challenged the broad interpretation implicit in the Constitutional language that empowers the Public Protector to “investigate any conduct in state affairs, or in the public administration in any sphere of government.”

In contrast to the Human Rights institutions, which have had internal problems but have largely remained outside of intense political controversy -- except maybe for the Human Rights Commissions' investigation into racism in the media -- the Auditor General and the Public Protector have both been directly involved in the intense conflicts over allegations of corruption in the 'arms deal' and 'oilgate,' questions that implicate both the ANC as a party and senior members of government. While it was the Auditor-General who first raised concerns about the 'arms deal' by declaring it a 'high risk' and requesting permission to investigate it, the Auditor-General has also avoided direct confrontation with the government agencies and institutions they are required to monitor by developing the practice of providing a 'disclaimer' or 'qualified audits' that are not deemed to be as serious as those cases in which the Auditor-General declares an 'adverse audit' indicating that 'severe problems have been detected.' The Public

Protector however became a lightning-rod of criticism by the media and non-government organizations in that period, both for the institutions unwillingness to confront government but most specifically for the 2005 Report that the Public Protector issued in response to complaints about the alleged misappropriation of public funds by the Petroleum Gas and Oil Company of South Africa (PetroSA), a state oil company which was accused of advancing R15 million in public funds to a private company -- Invume Investments -- which in turn donated R11-million to the ANC. Concerns about the unwillingness of the Public Protector to investigate some of these allegations and the report's perceived 'whitewash' of other allegations were only heightened when the North Gauteng High Court set aside the Report in a ruling on July 30, 2009, and were further exacerbated following strong public reaction to the news in early October 2009 that the outgoing Public Protector, Lawrence Mushwana, had received a golden handshake of R6.8 million in addition to the luxury car that he was entitled to purchase from the government at the end of his seven year non-renewable term. President Zuma's appointment on 19 October 2009 of Thulisile Madonsela, a well respected human rights advocate and constitutional lawyer, as the new Public Protector, produced public speculation that this institution might yet fulfill the constitutional role it was envisioned to play. If the present controversies and daily newspaper reports are anything to judge by, this institution is now a central part of the ongoing struggle to achieve good governance in South Africa.

## **Conclusion**

Legal certainty plays an important role in ensuring an effective system of administrative law and good governance. To the extent that it is possible to simplify processes, particularly accounting and procurement processes, so that it is both easier to participate and less complex to oversee, so the possibility of achieving legal clarity and certainty will be enhanced. With this in mind a more fruitful approach may be to distinguish between the legal requirements of the new system, including the constitutional standards that have been elaborated by PAJA and related legislation, from the more aspirational and ethical dimensions that are contained in the Constitution's listing of various principles of governance. Greater voluntary adherence to these aspirational elements may encourage less reliance on legal confrontations -- with all the difficulties of process and proof that both prevent effective resolution of problems and enable the use of accusation as a means to mire opponents and sectors of government in extended legal processes

Instead of making conflicts over governance a regular and effective tool of political combat, a greater reliance on ethical standards, in which credible accusations produce willing resignations and/or the withdrawal of parties from a particular governance process, may allow us to establish higher hurdles to the use of formal legal process and thus limit the opportunity for every government appointment or decision becoming an occasion of an elongated and disabling legal conflict. Of course the vulnerability of all participants in complex processes, leading to shortcomings and even failures, means that there has to be a balance between the consequences that might arise from cases of administrative failure and maladministration as opposed to cases of rank abuse of power and corruption. This balance may be located in a greater use of mechanisms of alternative dispute resolution, such as mediation and arbitration, as is practiced by the CCMA, and by placing a greater emphasis on ethical standards. For example, the difficulty of applying an adequately robust concept of conflicts of interest, as opposed to relying on the identification of financial benefits, is a prime area in which a more ethical – as opposed to a legalistic approach – might counter-intuitively improve our governance practices and enable a clearer understanding of when it might be necessary to invoke legal measures to protect and promote good governance.

Executive authority lies at the heart of effective government, yet the control of executive power remains one of the most difficult problems in any constitutional framework. The 1996 Constitution takes up this challenge by both empowering the President and establishing checks and balances by creating a range of independent institutions to both exercise particular aspects of executive power but also to serve as checks on the abuse of executive authority. While the more traditional checks on the executive have proven rather anemic in the context of South Africa's unipolar democracy, the intricate system of checks and balances in the governance structure provided by the Constitution has thus far survived intense political conflict and managed to sustain stable governance over the first two decades of our democracy.